

ASSEMBLY BILL

No. 567

Introduced by Assembly Member Simitian

February 18, 2003

An act to amend Section 17538.45 of the Business and Professions Code, relating to advertising.

LEGISLATIVE COUNSEL'S DIGEST

AB 567, as introduced, Simitian. Unsolicited electronic mail advertisements.

Existing law prohibits a registered user of an electronic mail service provider from using, or causing to be used, the provider's equipment located in this state in violation of the provider's policy prohibiting or restricting its use for the initiation of unsolicited electronic mail advertisements. Existing law also prohibits an individual, corporation, or other entity from using or causing to be used a provider's equipment located in this state in violation of the provider's policy prohibiting or restricting its use to deliver unsolicited electronic mail advertisements to its registered users. Existing law authorizes a provider whose policy is violated to bring a civil action to recover specified damages, and authorizes the court to award reasonable attorney's fees.

This bill would authorize the recipient of an advertisement that violates these provisions to bring an action for the recovery of actual damages or \$1,000, whichever is greater, for each violation.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 17538.45 of the Business and Professions Code is amended to read:

17538.45. (a) For purposes of this section, the following words have the following meanings:

(1) “Electronic mail advertisement” means ~~any~~ *an* electronic mail message, the principal purpose of which is to promote, directly or indirectly, the sale or other distribution of goods or services to the recipient.

(2) “Unsolicited electronic mail advertisement” means ~~any~~ *an* electronic mail advertisement that meets both of the following requirements:

(A) It is addressed to a recipient with whom the initiator does not have an existing business or personal relationship.

(B) It is not sent at the request of or with the express consent of the recipient.

(3) “Electronic mail service provider” means ~~any~~ *a* business or organization qualified to do business in California that provides registered users *with* the ability to send or receive electronic mail through equipment located in this state, and that is an intermediary in sending or receiving electronic mail.

(4) “Initiation” of an unsolicited electronic mail advertisement refers to the action by the initial sender of the electronic mail advertisement. It does not refer to the actions of ~~any~~ *an* intervening electronic mail service provider that may handle or retransmit the electronic message.

(5) “Registered user” means ~~any~~ *an* individual, corporation, or other entity that maintains an electronic mail address with an electronic mail service provider.

(b) No registered user of an electronic mail service provider shall use or cause to be used ~~that electronic mail service the~~ provider’s equipment located in this state in violation of ~~that~~ ~~electronic mail service the~~ provider’s policy prohibiting or restricting the use of its service or equipment for the initiation of unsolicited electronic mail advertisements.

(c) No individual, corporation, or other entity shall use or cause to be used, by initiating an unsolicited electronic mail advertisement, an electronic mail service provider’s equipment located in this state in violation of ~~that electronic mail service the~~

1 provider's policy prohibiting or restricting the use of its equipment
2 to deliver unsolicited electronic mail advertisements to its
3 registered users.

4 (d) An electronic mail service provider shall not be required to
5 create a policy prohibiting or restricting the use of its equipment
6 for the initiation or delivery of unsolicited electronic mail
7 advertisements.

8 (e) Nothing in this section shall be construed to limit or restrict
9 the rights of an electronic mail service provider under Section
10 230(c)(1) of Title 47 of the United States Code, or any decision of
11 an electronic mail service provider to permit or to restrict access
12 to or use of its system, or any exercise of its editorial function.

13 (f) (1) *The recipient of an advertisement transmitted in*
14 *violation of this section may bring an action for the recovery of*
15 *actual damages or one thousand dollars (\$1,000), whichever is*
16 *greater, for each violation.*

17 (2) In addition to any other action available under law, ~~any~~ *an*
18 electronic mail service provider whose policy on unsolicited
19 electronic mail advertisements is violated as provided in this
20 section may bring a civil action to recover the actual monetary loss
21 suffered by ~~that~~ *the* provider by reason of that violation, or
22 liquidated damages of fifty dollars (\$50) for each electronic mail
23 message initiated or delivered in violation of this section, up to a
24 maximum of twenty-five thousand dollars (\$25,000) per day,
25 whichever amount is greater.

26 ~~(2)~~

27 (3) In ~~any~~ *an* action brought pursuant to paragraph ~~(1)~~ (2), the
28 court may award reasonable attorney's fees to ~~a~~ *the* prevailing
29 party.

30 ~~(3)~~

31 (4) (A) In ~~any~~ *an* action brought pursuant to paragraph ~~(1)~~ (2),
32 the electronic mail service provider shall ~~be required to~~ establish
33 as an element of its cause of action that prior to the alleged
34 violation, the defendant had actual notice of both of the following:

35 (i) The electronic mail service provider's policy on unsolicited
36 electronic mail advertising.

37 (ii) ~~The fact that~~ *That* the defendant's unsolicited electronic
38 mail advertisements would use or cause to be used the electronic
39 mail service provider's equipment located in this state.

1 (B) In this regard, the Legislature finds that with rapid
2 advances in Internet technology, and electronic mail technology in
3 particular, Internet service providers are already experimenting
4 with embedding policy statements directly into the software
5 running on the computers used to provide electronic mail services
6 in a manner that displays the policy statements every time an
7 electronic mail delivery is requested. While the state of the
8 technology does not support such a finding at present, the
9 Legislature believes that, in a given case at some future date, a
10 showing that notice was supplied via electronic means between the
11 sending and receiving computers could be held to constitute actual
12 notice to the sender for purposes of this paragraph.

13 ~~(4)~~

14 (5) A violation of this section shall not be subject to Section
15 17534.

